

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0603

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM ASHLEY PARRISH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Sixteenth Judicial District Court,
Rosebud County, The Honorable Joe L. Hegel, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
JOHN PAULSON
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ELIZABETH THOMAS
Attorney at Law
P.O. Box 8946
Missoula, MT 59807-8946

ATTORNEYS FOR DEFENDANT
AND APPELLANT

MICHAEL B. HAYWORTH
Rosebud County Attorney
P.O. Box 69
Forsyth MT 59327-0069

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it denied Parrish's motion for a new trial, which was based on an alleged Brady violation?

2. Did the district court commit plain error when it failed to give sua sponte a jury instruction on the lesser included offense of negligent endangerment, or was defense counsel ineffective for failing to request such an instruction?

STATEMENT OF THE CASE

In an Amended Information filed on September 8, 2008, the Rosebud County Attorney charged William Parrish with aggravated assault (Count I) and criminal endangerment (Count II). The charges arose as a result of the serious bodily injuries, including skull and rib fractures and internal organ damage, sustained by M.G., the 15-month old infant son of Parrish's girlfriend, while in Parrish's care on August 5, 2008. The Amended Information alleged that Parrish caused the injuries to M.G. and then endangered the infant by delaying medical attention for the injuries. (D.C. Docs. 1, 3, 17.)

The district court appointed attorney John S. Forsythe to represent Parrish. (D.C. Doc. 7.) At the conclusion of a five-day trial on April 17, 2009, the jury found Parrish not guilty of aggravated assault and guilty of criminal endangerment. (D.C. Doc. 137.)

Parrish filed a motion for a new trial on May 5, 2009, asserting that the State had failed to disclose, prior to trial, certain documents in violation of the disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963). (D.C. Doc. 140.) The parties submitted briefs supporting and opposing the motion (D.C. Docs. 143, 144), and the district court conducted a hearing on the motion on June 15, 2009. On July 13, 2009, the court issued a memorandum and order denying the motion for a new trial. (D.C. Doc. 147.) A copy of the court's memorandum and order is included in the appendix to this brief.

At the sentencing hearing on August 31, 2009, the district court committed Parrish to the Department of Corrections, for placement at the Montana State Prison, for a term of eight years, with four years suspended. The court's written sentencing order was filed on September 8, 2009. (D.C. Doc. 157.) Parrish filed a notice of appeal with this Court on November 9, 2009. (D.C. Doc. 160.)

STATEMENT OF THE FACTS

In August 2008 Beth Hunziker was living in Forsyth, Montana, with her 15-month-old son (M.G.), her two-year-old daughter (M.G.'s sister), and her live-in boyfriend (Parrish). Parrish was not the children's father but had been living with Hunziker and the children since December 2007. At about 8 a.m. on August 5, 2008, Hunziker left the children at home in Parrish's care while she ran

some errands. At the time she left, M.G., who was not yet walking, was in his high chair eating breakfast and acting normally. (Trial Tr. at 183-91.)

Hunziker returned home at 11 a.m. and found M.G. apparently asleep on the floor. As Parrish picked up M.G. to put him in his crib, he told Hunziker that M.G. had a bump on the back of his head. Parrish claimed that he did not know how M.G. got the bump but suggested that M.G.'s sister may have hit M.G. with a toy. Parrish left a short time later for work. (Trial Tr. at 191-95.)

Hunziker noticed that M.G. was whimpering and not acting normally, so she took M.G. to the medical clinic in Forsyth that afternoon. At the clinic Hunziker learned that M.G. had sustained a skull fracture, internal bruising, and broken ribs. Later that afternoon M.G. was taken by ambulance to the intensive care unit at the Billings Clinic, where he was treated and observed for three days before being transferred to Children's Hospital in Aurora, Colorado. (Trial Tr. at 196-200.)

It was determined that M.G. had suffered a depressed skull fracture with a maximum depression of five millimeters. In addition, M.G. had other life-threatening injuries to his liver, pancreas, and ribs. The treating physicians concluded that M.G. had suffered non-accidental trauma and that the injuries were inconsistent with the history that Parrish, through Hunziker, provided. (Trial Tr. at 258-62, 295, 304.)

Parrish persisted with his story that he had fallen asleep and did not know how M.G. had been injured. After his arrest on August 12, 2008, however, Parrish changed the story. He claimed that he had picked up M.G. to put him in his crib, that he had tripped over a baby gate in the doorway to the bedroom, that he had fallen onto the floor while holding M.G. in his hands, and that M.G.'s head had struck the floor. He further claimed that M.G. had stopped breathing after the fall, that he had tried administering adult CPR to M.G. through chest compressions, and that M.G. had revived just moments before Hunziker returned home. Hunziker first learned of Parrish's new account of the injuries from Parrish's attorney at a bail reduction hearing. (Trial Tr. at 202-03, 432-37, 712-26.)

Parrish testified that he didn't tell Hunziker about the accident because he was afraid that she would leave him due to his incompetence as a caretaker for the children. He also testified that he was afraid the children would be removed from the home if he took M.G. to the hospital for medical care. He claimed his fear was based on a previous incident in which M.G. had been injured while in his care. Less than two months earlier, on June 16, 2008, Parrish brought M.G. to the local hospital for treatment for a broken arm. He told the medical staff that he had been holding M.G. with one hand while he closed the refrigerator door with the other. According to Parrish, M.G. wriggled out of his grasp and began to fall to the floor. He grabbed M.G. by the arm and heard a popping sound. He took M.G. to the

hospital, where the infant was treated for what was believed to be a spiral fracture. (Trial Tr. at 236, 440-41, 580-81, 699-702.)

Because of the nature of the injury, which often results from child abuse, the medical staff contacted law enforcement and child protective services.

Grant Larson, the community social worker supervisor for the Montana Department of Public Health and Human Services (the Department), investigated Parrish's account of the injury. Larson talked with both Hunziker and Parrish about the investigation and the Department's concerns. The next day M.G.'s medical diagnosis was changed to an oblique fracture, making Parrish's explanation plausible, and Larson determined that no further investigation or intervention would be necessary. Larson testified that he called Hunziker and told her a social worker would be coming to her house to see how they were doing. The investigation file was officially closed on July 18, 2008. (Trial Tr. at 598-603.)

However, Hunziker and Parrish testified that neither Larson nor anyone from the Department contacted them after June 16, causing them to live in fear that Larson would return and remove the children from the home. Hunziker stated that, contrary to Larson's testimony, she did not meet with a social worker on June 17, the day after the accident, or anytime thereafter. To counter this testimony during cross-examination, the prosecutor introduced several release of information forms

which Hunziker had signed for a social worker on June 17. The forms, which facilitated the sharing of information among the medical providers, law enforcement, and the Department, were admitted over Parrish's objection as to their relevance. (Trial Tr. at 708-09, 936-37, 968-75; Ex. 48-51, Trial Tr. at 975.)

Additional facts will be discussed as necessary in the argument below.

STANDARDS OF REVIEW

Pursuant to Mont. Code Ann. § 46-16-702(1), the district court may grant the defendant a new trial "if required in the interest of justice." This Court reviews the grant or denial of a motion for a new trial for an abuse of discretion. State v. Jackson, 2009 MT 427, ¶ 50, 354 Mont. 63, 221 P.3d 1213. However, the district court's factual findings are reviewed for clear error, and the Court's review of questions of constitutional law is plenary. Id.

Under the "plain error" doctrine, this Court has the inherent power to discretionarily review claimed errors that implicate a defendant's fundamental constitutional rights, even if the defendant did not timely object in the trial court. State v. Jackson, supra, ¶ 42. The doctrine is invoked sparingly and only where failure to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial, or may

compromise the integrity of the judicial process. Id.; State v. Gerstner, 2009 MT 303, ¶ 22, ___Mont.___, 219 P.3d 866.

Claims of ineffective assistance of counsel present mixed questions of law and fact that are reviewed de novo on appeal. State v. Meredith, 2010 MT 27, ¶ 51, 355 Mont. 148, 226 P.3d 571.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that Parrish did not establish a Brady violation based on the alleged failure of the State to disclose the information release forms before trial. Because there was no violation of Parrish's due process discovery rights, the district court did not abuse its discretion when it denied Parrish's motion for a new trial.

This Court should decline to review Parrish's alleged instructional error claim under the plain error doctrine, since the district court's failure to instruct the jury sua sponte on the lesser offense of negligent endangerment did not violate Parrish's due process right to a fair trial. Parrish's trial counsel did not render ineffective assistance by failing to request a jury instruction on the lesser charge. This Court should affirm the district court's posttrial ruling and Parrish's conviction.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING PARRISH'S MOTION FOR A NEW TRIAL.

Parrish's first two issues concern the alleged Brady violation that was the basis for his motion for a new trial. The State's brief will consider the issues together in the context of the district court's denial of Parrish's motion.

A. Background

The district court's memorandum and order denying the motion for a new trial summarizes the background facts for Parrish's Brady claim. The court noted that M.G. had been injured while solely in Parrish's care, and that Parrish did not report the injury or take M.G. for medical care. Initially, he told Hunziker and the authorities that he did not know how the injuries had occurred and suggested that M.G.'s sister had hit M.G. in the head. Later, Parrish changed his story and claimed that he was carrying M.G. to put him down in his crib when he tripped over a child gate in the doorway, falling to the floor with M.G. and knocking the child limp and unconscious. Parrish claimed that he resuscitated M.G. by doing adult-style CPR on M.G. and then panicked when he heard Hunziker returning home, pretending to have been asleep and unaware of how M.G. was injured.

The court further noted that on June 16, 2008, about two months prior to the skull fracture incident, Parrish had been caring for M.G. when M.G.'s arm had been broken. At that time Parrish had promptly reported the injury and obtained

medical treatment for M.G. This earlier incident was investigated by child welfare authorities from the Department. The Department did not file a dependent and neglect action because the medical evidence indicated that M.G.'s broken arm could have been caused in the manner described by Parrish.

The court observed that in the present case, Parrish was claiming that he did not report M.G.'s injuries because, given the tenor of the investigation of the broken arm incident two months before, he was afraid that the Department would take M.G. and his sister from Hunziger and himself.

After the charges were brought against Parrish, the defense filed a general request to obtain unrestricted access to the Department's files involving both incidents, along with a general request for all exculpatory information. (D.C. Doc. 37.) The State did not resist the request for information from the Department's files but referred the matter to the district court to conduct an in camera review of the files for exculpatory information in view of the confidential nature of the files. (D.C. Doc. 58.) The court reviewed the files in camera and ordered disclosure of a number of documents to the defense. The documents did not include the information releases in question, which Hunziker signed on June 17, 2008. Those releases pertained to the prior broken arm incident and not to the skull fracture incident at issue in the present case.

The court summarized the arguments of the parties, with particular attention to Parrish's claim that the failure of the State (and the district court) to disclose the releases pretrial prejudiced the defense. The court noted that the defense wanted early access to the releases signed by Hunziker in order to use them to impeach Grant Larson regarding whether he called Parrish or Hunziker to tell them that the investigation of the broken arm incident was closed, and to avoid the impeachment of Hunziker with respect to her testimony that no social worker had visited her regarding the broken arm incident after June 16. Citing State v. Hatfield, 269 Mont. 307, 888 P.2d 899 (1995), the court noted that impeachment evidence is generally not considered "exculpatory evidence" under Brady, since it generally does not tend to negate the defendant's guilt or vitiate his conviction. At best, the releases would have cast more doubt on Larson's testimony about informing Parrish that the investigation was being closed, thus buttressing Parrish's contention that he failed to report the skull fracture incident because he was afraid of what the Department would do.

The court recognized that Parrish's "panic" defense might possibly show that he failed to report the serious injuries to Hunziker or authorities for some purpose other than subjecting M.G. to an increased risk, but this line of defense would have no effect in proving that he did not knowingly subject M.G. to the increased risk. The offense of criminal endangerment requires proof that the

defendant acted knowingly, rather than purposely, in engaging in conduct that creates a substantial risk of death or serious injury.

The court found that it had, in fact, given the defense information about the social worker's June 17 visit with Hunziker and the signing of the releases. The social worker's notes, which documented the visit and the releases, were disclosed to the defense before trial, even though the actual releases were not included in the documents provided to the defense after the court's in camera inspection of the Department's files. (Defendant's Ex. B, p. 7; Trial Tr. at 625.) A copy of the notes was attached to the State's response to the motion for a new trial. (D.C. Doc. 143.) The court found that the defense did not make any specific request for the releases themselves after receiving notice of their existence in the social worker's notes about the June 17 visit.

The court noted that the defense had done a good job of impeaching Larson during cross-examination on the issue of whether he told Parrish or Hunziker that the investigation was over. The prosecutor brought up the social worker's notes, which referenced the visit and the signing of the releases, on redirect examination. (Trial Tr. at 619-21.) Parrish did not question Larson about the matter on recross-examination or request that Larson be recalled in Parrish's case-in-chief. Although Parrish may have made good use of the actual releases in arguing to the

jury, the court concluded that the releases themselves were cumulative impeachment evidence.

The court found that, contrary to his posttrial contention, Parrish extensively argued the panic defense in his opening statement, with reference to the broken arm incident, and introduced evidence of the broken arm incident himself. Before trial, Parrish indicated that he would introduce evidence of Larson's threats arising from the broken arm incident to explain his actions in the skull fracture incident. The court noted that evidence such as the releases cuts both ways. The court concluded that the case was well-tried, and that both parties received a fair trial. The court further concluded that disclosure of the releases would not likely have resulted in a different verdict, the interests of justice do not require a new trial, and Parrish's motion for a new trial should be denied.

B. Discussion

Under Brady's due process disclosure requirements, the State must turn over to the defense any evidence that is material to the defendant's guilt or punishment. Jackson, ¶ 52. To establish a due process violation, the defendant must show that the State possessed evidence, including impeachment evidence, favorable to the defense, that the defendant did not possess the evidence and was unable to obtain it with reasonable diligence, that the prosecutor suppressed the favorable evidence, and that a reasonable probability exists that, had the evidence been disclosed, the

outcome of the proceedings would have been different. Id., citing State v. Johnson, 2005 MT 318, ¶ 12, 329 Mont. 497, 125 P.3d 1096.

Parrish contends that all of the elements of a Brady violation can be satisfied here. However, the district court's conclusion to the contrary is fully supported by the facts and the law, and this Court should find no persuasive reason to disturb the ruling.

The Court recently considered a similar alleged Brady violation in Jackson. The defendant in Jackson sought a new trial on the ground that the State withheld potentially exculpatory counseling admissions by one of the State's witnesses. The district court disagreed, finding that the prosecutor had not been aware of the privileged conversations, that the substance of the conversations was not favorable to the defendant, that the State had provided the defense with the name of the counselor, that defense counsel could have discovered the evidence with their own diligence, and that disclosure would not have changed the outcome of the trial. This Court affirmed the ruling. Jackson, ¶ 54.

Similarly, the information releases that Hunziker signed were in the Department's confidential files, the prosecutor facilitated disclosure of any exculpatory information in the files through the in camera inspection, the releases were cumulative impeachment evidence, the social worker's notes disclosed pretrial to the defense contained references to the releases that would have

permitted Parrish to discover them with due diligence, and disclosure of the actual releases would not have changed the outcome of the trial. As the prosecutor noted in his response to the motion for a new trial, the releases themselves, which related only to the earlier broken arm incident, were not exculpatory under Brady and Hatfield, and they became important only for their cumulative impeachment value following the testimony at trial. (D.C. Doc. 143.)

Suppression of evidence by the prosecution violates due process only when the evidence is material to either guilt or punishment. State v. Thompson, 2001 MT 119, ¶ 31, 305 Mont. 342, 28 P.3d 1068. Evidence is material if there is a reasonable probability that the result of the trial would have been different had the evidence been disclosed to the defense. Id. Cumulative impeachment evidence is not considered material evidence and does not satisfy the Brady materiality requirement. Hiebert v. Cascade County, 2002 MT 233, ¶ 42, 311 Mont. 471, 56 P.3d 848. The district court correctly recognized that the information releases at issue were not material to Parrish's guilt. Their pretrial disclosure would not have changed the result of the trial.

The district court's lengthy and well-reasoned order is factually supported and legally correct. This Court should conclude, as it did in Jackson, that the record does not support the defendant's claim of a Brady violation.

Citing State v. Clark, 2005 MT 330, 330 Mont. 8, 125 P.3d 1099, Parrish argues that the district court abused its discretion when it denied his motion for a new trial. Clark articulated a five-part test for determining whether a defendant who alleges newly discovered evidence should be granted a new trial. Contrary to Parrish's argument, however, the discovery of the information release forms does not satisfy the Clark test for a new trial. The forms were "discovered" during the trial, the failure to discover the forms prior to trial was the result of a lack of diligence on Parrish's part, the forms were not material to any issues at trial, the forms were cumulative and merely impeaching, and Parrish has not established a reasonable possibility of a different trial outcome with the forms.

The district court correctly recognized that even if Parrish could have used the release forms to better establish the basis for his fear of an ongoing Department investigation that could possibly lead to the removal of the children from Hunziker's home, that fear or belief would not provide a defense to the charge of criminal endangerment. The offense of criminal endangerment requires proof that Parrish acted knowingly, not purposely, and proof of Parrish's reasons for not seeking medical help for M.G. was not material to the issue of guilt or necessary for the jury's determination.

Since there was no Brady violation, the district court did not abuse its discretion in denying Parrish's motion for a new trial. Jackson, ¶ 55. This Court should affirm.

II. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR BY FAILING TO GIVE SUA SPONTE AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF NEGLIGENT ENDANGERMENT, AND DEFENSE COUNSEL'S FAILURE TO REQUEST THE INSTRUCTION DID NOT AMOUNT TO INEFFECTIVE ASSISTANCE.

Parrish's third and fourth issues concern the failure of his counsel to request, and the failure of the district court to give sua sponte, a jury instruction on the lesser included offense of negligent endangerment. The issues will be discussed together in the argument below.

A. Background

Parrish was charged with criminal endangerment in violation of Mont. Code Ann. § 45-5-207, an offense that is committed when the defendant knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another. Criminal endangerment is a felony punishable by up to ten years in prison.

As provided in Mont. Code Ann. § 45-5-208, the offense of negligent endangerment is committed when the defendant negligently engages in conduct

that creates a substantial risk of death or serious bodily injury to another.

Negligent endangerment is a misdemeanor punishable by up to one year in jail.

The mental states of “knowingly” and “negligently” are defined in Mont. Code Ann. § 45-2-101. Negligent endangerment would arguably qualify as an included offense of criminal endangerment under Mont. Code Ann.

§ 46-1-202(9)(c), because the offense differs from the charged offense only in the respect that a lesser kind of culpability suffices to establish its commission.

However, this Court has previously declined to address whether negligent endangerment is a lesser included offense of criminal endangerment. State v. Martinosky, 1999 MT 122, ¶ 22, 294 Mont. 427, 982 P.2d 440; State v. Martinez, 1998 MT 265, ¶¶ 10, 19, 291 Mont. 265, 968 P.2d 705. Cf. State v. Brown, 270 Mont. 454, 893 P.2d 320 (1995).

Defense counsel did not submit a pretrial request for a jury instruction on negligent endangerment. (D.C. Doc. 116.) The jury instructions were settled at a conference at the conclusion of the fourth day of trial. (Trial Tr. at 1009-23.) Neither defense counsel nor the prosecutor asked the district court to give a jury instruction on negligent endangerment, and the matter was not discussed during the settlement conference. The court did not give a sua sponte instruction on negligent endangerment. During his closing argument, defense counsel argued that, although Parrish’s conduct may have been irresponsible, he did not act knowingly in

creating a risk to M.G. and therefore should be acquitted of the charge of criminal endangerment. (Trial Tr. at 1074-75.)

B. Discussion

Acknowledging that the issue was not preserved for appeal, Parrish nonetheless maintains that the court's failure to instruct the jury on negligent endangerment should be reviewed under the plain error doctrine or by means of an ineffective assistance of counsel claim. He suggests that the evidence was sufficient to support the lesser offense, that he was entitled to a jury instruction that gave the jury the option of convicting him of negligent endangerment, and that his attorney had no plausible justification for failing to request such an instruction.

1. Plain Error

Under the plain error doctrine as formulated in State v. Finley, 276 Mont. 126, 915 P.2d 208 (1996), overruled on other grounds by State v. Gallagher, 2001 MT 39, 304 Mont. 215, 19 P.3d 817, this Court may discretionarily review claimed errors that implicate a defendant's fundamental constitutional rights, even if no contemporaneous objection is made. Plain error review is exercised sparingly, on a case-by-case basis, only where failure to review the claimed error may result in a manifest miscarriage of justice, leave unsettled questions of fundamental fairness, or compromise the integrity of the judicial process. State v. Gallagher, 2005 MT 336, ¶ 14, 330 Mont. 65, 125 P.3d 1141.

As provided in Mont. Code Ann. § 46-16-410(3), a party may not assign as error any omission from the instructions unless an objection was made specifically stating the matter objected to, and the grounds for the objection, at the settlement of instructions. In view of this specific statutory mandate, this Court ordinarily declines to apply the plain error doctrine to review an asserted instructional error to which no contemporaneous objection was made. State v. Wilson, 2007 MT 327, ¶¶ 36-39, 340 Mont. 191, 172 P.3d 1264; State v. Rinkenbach, 2003 MT 348, ¶ 13, 318 Mont. 499, 82 P.3d 8; State v. Earl, 2003 MT 158, ¶ 26, 316 Mont. 263, 71 P.3d 1201.

In State v. Billedeaux, 2001 MT 9, ¶ 16, 304 Mont. 89, 18 P.3d 990, the Court summarized the rationale for rejecting instructional error claims such as Parrish's. Under Mont. Code Ann. § 46-16-607(2), a lesser included offense instruction must be given where there is a proper request by one of the parties. However, in the absence of such a request, the trial court has no duty to instruct the jury on a lesser included offense. State v. Sheppard, 253 Mont. 118, 832 P.2d 370 (1992). This rule allows counsel to omit an otherwise appropriate lesser included offense instruction as part of a trial strategy of forcing the jury to choose between finding the defendant guilty of the greater offense or outright acquittal.

In Sheppard and later in State v. Leyba, 276 Mont. 45, 919 P.2d 794, overruled in part on other grounds by Whitlow v. State, 2008 MT 140, ¶ 13,

343 Mont. 90, 183 P.3d 861, the Court elaborated on the rule in Montana that gives the defense and the prosecution the option of foregoing a lesser charge instruction for strategic reasons. In Sheppard, 253 Mont. at 124, the Court observed that lawyers, not judges, try the cases under our adversarial system of justice. Both the prosecutor and the defense counsel may make the decision to force the jury to either convict or acquit the defendant of the offense charged without being given the opportunity to take the middle ground and convict of the lesser charge. Mandatory sua sponte jury instruction is inconsistent with Montana law and the public policy of allowing counsel to conduct the case according to his or her own strategy.

In Leyba, 276 Mont. at 51, the Court cited Spaziano v. Florida, 468 U.S. 447, 456-57 (1984), for the proposition that there may well be cases in which the defendant will be confident enough that the State has not proved its case that the defendant will want to take his or her chances with the jury. If so, there is little reason to require the defendant to give the State what is perceived as an advantage—the opportunity to convict the defendant of a lesser offense if it fails to persuade the jury he or she is guilty of the greater offense.

Parrish does not identify the fundamental constitutional right allegedly implicated, for purposes of plain error review, by the district court's failure to give sua sponte an instruction on negligent endangerment in his case, but he is probably

referring to his due process right to a fair and impartial trial. Sheppard, 253 Mont. at 124. However, in Sheppard the Court held that the district court's failure to instruct the jury sua sponte on a lesser included offense did not deprive the defendant of his right to due process. The Court reviewed a number of federal circuit court decisions holding that the failure of a state court to instruct on a lesser included offense in a noncapital case does not raise a federal constitutional question.

Parrish suggests that his request for plain error review is supported by State v. Castle, 285 Mont. 363, 948 P.2d 688 (1997), but Castle did not involve the question of the appropriateness of reviewing an omitted instruction under the plain error doctrine. Instead, Castle was concerned with the district court's refusal of a proposed instruction on a lesser offense. Parrish has pointed to no authority from this Court that supports invocation of the plain error doctrine to review his allegation of instructional error.

This Court should decline Parrish's invitation to review this claim under its discretionary plain error authority. Failure to review the claim would not implicate any of Finley's concerns about a possible manifest miscarriage of justice, the fundamental fairness of the trial, or the integrity of the judicial process. The district court did not violate any of Parrish's fundamental constitutional rights by

failing to give a lesser charge instruction in the absence of a proper request by a party.

2. Ineffective Assistance

As an alternative basis for reviewing his claim, Parrish argues that his trial counsel, John Forsythe, should have proposed an instruction on negligent endangerment. His failure to do so, Parrish contends, constitutes ineffective assistance of counsel (IAC).

IAC claims, based upon the standards for effective representation in Strickland v. Washington, 466 U.S. 668 (1984), often accompany requests for plain error review of procedurally defaulted issues arising from alleged instructional error. State v. Dubois, 2006 MT 89, 332 Mont. 44, 134 P.3d 82; Gallagher, 2005 MT 336, at ¶¶ 22-28; State v. Gray, 2004 MT 347, ¶¶ 15-22, 324 Mont. 334, 102 P.3d 1255. If the appellant cannot persuade this Court to review the claim under the plain error doctrine, the appellant attempts to accomplish the same result through an IAC claim against trial counsel.

Under the performance prong of Strickland test, a criminal defendant is denied effective assistance of counsel if counsel's conduct falls below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances. Whitlow, ¶ 20. The reviewing court must indulge a strong presumption that counsel's conduct falls within a wide range of

reasonable professional assistance, and the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Whitlow, ¶ 21.

A defendant may raise only record-based IAC claims on direct appeal. Meredith, ¶ 51. A claim is record-based if the record fully explains why counsel took, or failed to take, a particular course of action. Id. If the allegation cannot be documented from the record, the claimant must raise the IAC claim in a petition for postconviction relief. Id. Where the IAC claim is based upon counsel's failure to request an instruction, this Court has determined that the record is sufficient to undertake review of the claim. Gallagher, 2005 MT 336, at ¶ 23. In other instances, the Court has determined that such claims are better suited for postconviction proceedings. State v. Taylor, 2010 MT 94, ¶ 22, 356 Mont. 167, ___P.3d___; State v. Green, 2009 MT 114, ¶ 22, 350 Mont. 141, 205 P.3d 798.

If the Court finds the record sufficient to permit review of Parrish's IAC claim, the Court should find no basis in the record for concluding that Parrish's trial counsel rendered ineffective assistance. In his closing argument, counsel made clear his strategy to force the jury to choose between convicting and acquitting Parrish of the greater charge. Parrish has not overcome the presumption that counsel's actions or omissions with respect to a lesser offense instruction were within the wide range of reasonable professional assistance and part of a sound

trial strategy. Parrish has not alleged that counsel's conduct violated any prevailing professional norms or contravened any judicial decision. Counsel had a plausible justification for failing to request a lesser offense instruction, and Parrish has not shown that counsel's strategy was objectively unreasonable. The benefit of hindsight does not provide any support for Parrish's IAC claim or justify Parrish's request for a new trial.

The record fully supports the conclusion that Parrish's trial counsel provided effective representation in defense of the charge, and this Court should reject Parrish's IAC claim.

CONCLUSION

The district court's posttrial ruling and Parrish's criminal endangerment conviction should be affirmed.

Respectfully submitted this 24th day of June, 2010.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
JOHN PAULSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Mr. Michael B. Hayworth
Rosebud County Attorney
P.O. Box 69
Forsyth MT 59327-0069

Ms. Elizabeth Thomas
Attorney at Law
P.O. Box 8946
Missoula, MT 59807-8946

DATED _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

JOHN PAULSON

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0603

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM ASHLEY PARRISH,

Defendant and Appellant.

APPENDIX

Memorandum and Order dated July 9, 2009Appendix